State of New York
Court of Appeals

BEFORE: HON. GEORGE BUNDY SMITH, Associate Judge

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THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

JOHN BELSITO,

Appellant.

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CERTIFICATE DENYING LEAVE

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York

December 14, 1993

/S/_____

Order of the Appellate Term, 9th & 10th Judicial Districts, entered November 3, 1993, affirming the judgment of the District Court, Nassau County, rendered March 1, 1992.

State of New York
Court of Appeals
George Bundy Smith
Judge

Court of Appeals
Hall
Albany, New York
12207

December 14, 1993

Keith A. Lavallee, Esq.
33 Guy Lombardo Avenue
Freeport, N.Y. 11520

Re: People v. John Belsito
Indictment No. 22790/90 District
Court, Nassau County

Dear Mr. Lavallee:

Enclosed you will find a copy of an order signed today denying your application for permission to appeal to the Court of Appeals in the above-referenced case.

Very truly yours,

/S/

George Bundy Smith

GBS:ba

cc: Robert A. Schwartz, Esq.
Assistant District Attorney, Nassau County
Clerk's Office
Court of Appeals

October 19, 1993 TERM

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts held in Westchester County, on November 3, 1993

Present-Hon. ANDREW J. DI PAOLA Presiding Justice

THOMAS M. STARK Associate Justice

DANIEL F. LUCIANO Associate Justice

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

--against--

JOHN BELSITO,

Appellant.

----------X

The above named appellant having appealed to this court from a judgments of the District Court of nassau County rendered on March 13, 1992 convicting him upon jury verdicts of driving while intoxicated (Vehicle and Traffic Law Section 1192[3], unlicensed operation of

a motor vehicle (Vehicle and Traffic Law Section 509[1]), and speeding (Vehicle and Traffic Law Section 1180[b]) and imposing sentences;

and the appeal having been submitted by KEITH A. LAVALLEE, ESQ., for the appellant and by ROBERT A. SCHWARTZ, ESQ. for the respondent and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgments of conviction are affirmed. All concur.

DISTRICT ATTORNEY'S OFFICE
CRIMINAL APPEALS BUREAU
262 OLD COUNTRY ROAD
MINEOLA, N.Y.

SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE TERM : 9th and 10th JUDICIAL DISTRICTS

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PRESENT: DiPAOLA, P.J., STARK
and LUCIANO, JJ.

----------X

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

-against- NO. 93-546 N CR

JOHN BELSITO, DECIDED

Appellant.

----------X

Appeal by defendant from judgments of the District Court of Nassau County (Calabrese, J.) rendered on March 13, 1992 convicting him upon jury verdicts of driving while intoxicated (Vehicle and Traffic Law Section 1192[3]), unlicensed operation of a motor vehicle (Vehicle and Traffic Law Section 509[1]), and speeding (Vehicle and Traffic Law Section 1180[b]) and imposing sentences.

Judgments of conviction are affirmed.

In our opinion, Vehicle and Traffic Law

section 1192 (9) is constitutional and valid (see, People v. Farmer, 36 NY 2d 386; People v. Fielder, 78 Misc 2d).

All concur.

here real late this morning. By the time we finished this morning's work, it was well after 1:00 o'clock, so we got started a little late this afternoon, but thank you very much for your promptness.

The next step in the trial is going to be the opening statement by the People.

MR. COPPERTINO: Thank you, your Honor.

May it please the Court, Mr. Lavallee, Ladies and Gentlemen of the Jury, as the Judge indicated yesterday, the People have an obligation to deliver an opening statement to the jury. Now, the purpose of the opening statement is for us to tell you what this case involves and what we expect to prove and with that in mind, permit me to read to you the Simplified Traffic Informations which charge the defendant with certain offenses under the Vehicle and Traffic Law. The first is under TI #2410634. It accuses John Belsito of 53

Neptune Avenue, North Babylon, New York of driving license plate number HL6311, New York registration, a commercial black '86 Ford truck on Sunday, December 9, 1990 at 2:35 a.m. westbound on the Long Island Expressway at Exit 41 in Jericho, County of Nassau, State of New York, in violation of New York State Vehicle and Traffic Law Section 1192.2 and the description of the operation is operating with .10 or more percent of alcohol in blood, to wit, .12 percent and it is affirmed under penalty of perjury by Gregory Celentano, the arresting officer.

That particular Simplified Traffic Information is also supported by what's known as a supporting deposition. I quote from that: "The People of the State of New York against John Belsito, Defendant. I, Police Officer Gregory J. Celentano, depose and say that on the 9th day of December I observed

subject operating a 1986 Ford pickup, New York registration HL3611 westbound Long Island Expressway at Exit 41, Jericho, in excess of the New York State speed limit of 55 miles per hour, to wit, 85 miles per hour. Subject also operated motor vehicle weaving from left to right lane to left lane. Vehicle stopped. Subject exited vehicle, staggered, swayed, bloodshot eyes and had the odor of an alcoholic beverage on his breath. Subject given standard field sobriety test" and this is signed under penalty of perjury by Gregory Celentano, a Police Officer of the Highway Patrol Bureau.

Defendant has also been charged under ticket number #TI2410660 with at the same time and place, with a violation of New York State Vehicle and Traffic Law Section 1163D, failed to signal lane change. That too is signed by the arresting Officer, Gregory Celentano.

And the next ticket is ticket #TI2410671,

which the defendant is charged with a violation of New York State Vehicle and Traffic Law Section 509.1, unlicensed operator and again, signed by the arresting Officer.

Simplified Traffic Information number #TI2410656, charges the defendant with a violation of New York State Vehicle and Traffic Law Section 1128A, unsafe lane changes and it is also signed by Police Officer Gregory Celentano.

And, finally, TI#2410646 charges the defendant with a violation of New York State Vehicle and Traffic Law Section 1180B, speed, radar, 85 miles per hour in a 55 mile per hour zone and this, like any other Simplified Traffic Informations is signed by the arresting Officer on the 9th day of December, 1990, under penalty of perjury.

Now, putting aside the rather formalistic language of the supporting deposition and the

Simplified Traffic Informations, this is simply a case about a man who got on the Long Island Expressway and drove while he was in an intoxicated condition. The People will prove their case by calling three Police Officers; Gregory Celentano, whom you've heard about. He's the arresting Officer and an Officer with over ten years of experience on the Nassau County Police force.

Officer Robert Scuderi, also an experienced Police Officer, who is the assisting Officer on December 9, 1990, the night in question;

And finally, Police Officer Robbert, also of the Highway Patrol Bureau. He has twenty-three years of experience. He was the breath technician that gave the breath tests and also had the defendant performed certain field sobriety tests as well.

Now, their testimony will take us back to Sunday night, December 9, 1990, and the Long

Island Expressway at around Exit 41, right here in our County of Nassau in the State of NewYork. Officer Celentano is on routine radar enforcement that night. He set up his radar from his police car at Exit 41 of the Long Island Expressway and he noticed headlights, headlights that would later turn out to be from a vehicle driven by the defendant. He estimated the speed of that vehicle that went by him, the pickup truck, at 85 miles per hour. That speed of that truck also produced a reading of his radar of 85 miles per hour. He also noticed that that vehicle was straddling two lanes of traffic on the Long Island Expressway in a westbound direction, so as that vehicle passed, Officer Celentano pursued it and he estimated the speed at over 90 miles an hour. He saw that vehicle weave from lane to lane. He saw that vehicle almost sideswipe two other vehicles, one to the right and one to the left and that

vehicle never signalled when it changed from lane to lane.

Officer Celentano was able to stop that vehicle and when he stopped it, the defendant was unable to produce a license, was asked to step out of the vehicle and had difficulty exiting the vehicle. There was an odor of alcoholic beverage on his breath. His eyes were bloodshot. He staggered, swayed and needed the vehicle to support himself. He was asked to perform certain field sobriety tests, asked to state the ABC's and was unable to do that. He was also unable to stand on one leg. He was arrested and transported back to the Police headquarters. An alcoholic odor was noted and present in the Police car when he was transported back and when he got back to Police headquarters, he was twice asked to give a breath test and he twice gave a breath test. Each time the reading was .12 percent

of blood alcohol. Again, he was asked to perform tests - a balancing test where he was just asked to stand up straight at attention and the Officer noted that he swayed four inches from side to side and four inches front and back. He was asked to do a simple walk and turn test, which he had to walk down nine steps in one direction and nine steps back in another direction. He was unable to perform that test and again, was asked to stand on one leg and again, he swayed and used his arms for balance and had to put his foot down.

In short, Ladies and Gentlemen, that is what the People intend to prove, that on the 9th day of December, 1990, the defendant operated a vehicle in an intoxicated condition; that he operated that vehicle with more than .10 percentage by weight of alcohol in his blood, by chemical analysis on his breath; that he moved unsafely from lane to lane without signalling the changes from those

lanes and that he operated without a license.

Ladies and Gentlemen, at the end of this trial, I will stand before you once again in what's known as summations and at that time Iwill ask you to find the defendant guilty as charged of all counts against him.

Thank you.

THE COURT: Thank you, Counsel.

Mr. Lavallee, do you wish to make an opening statement?

MR. LAVALLEE: Yes, your Honor.

Good afternoon, Ladies and Gentlemen. The defendant here stands before you accused of a crime. We discussed this yesterday, and the District Attorney just portrayed to you what he believed the testimony is going to put forth for you to determine whether or not those facts in fact happened. It's the defendant's position that he was not doing 85 miles an hour; he was not and did not in any event, in any way whatsoever, swerve and

almost miss a vehicle or cause an accident. I believe the testimony that you will hear will show otherwise. The defendant at the scene was not leaning on his car. In fact, hehad -- as soon as he was pulled over -- was pulled over toward the Police Officer's vehicle and had to stand by the Police Officer's vehicle.

The defendant was asked to perform

MR. COPPERTINO: No, thank you, Your Honor.

THE COURT: The motions are denied.

All right, now, before summations and in the absence of the jury and pursuant to CPL 300.10, I'm informing both sides that it's my intention to submit to the jury for their consideration, with respect to the first count, a violation of section 1192.2 with which the defendant is charged, a violation of section 1192.3 and a violation of section 1192.1.

With respect to each of the other counts the defendant is charged with, only the particular charge that he is charged with and no other charges.

Do the People wish to be heard on this submission?

MR. COPPERTINO: Yes, Your Honor. The People would just -- I'm sorry -- withdrawn.

THE COURT: Defendant?

MR. LAVALLEE: Yes, the defendant wishes to be heard, Your Honor. The defendant would object to being charged with 1192.3 in that the defendant here is charged on the docket number with 1192.2. In the People's opening statement, the People said they were charging this defendant with the violation of section 1192.2 and being now that it's the close of the case, there would be no way for me to adequately defend the charges of 1192.3.

THE COURT: People?

MR. COPPERTINO: Your Honor, the people are relying upon he statute and case law which permits the jury to be charged on 1192.3 in a case such as this.

THE COURT: Statutory question.

MR. LAVALLEE: Correct, Your Honor, and with respect to the People's -- I do not contest -- the People have the power to amend the charges. However, the people must do this either on written information prior to

beginning a case and not at the end of the case and being that the defendant has not been afforded the right to answer the questions and respond within the statutory time limits to a new charge being implemented, the defendant would hereby say we should object based upon the People's failure to provide us with a written amended charge of 1192.3.

THE COURT: People?

MR. COPPERTINO: Your Honor, again, the People rely upon the statutory provisions -- I believe it is under section 1192.7, is it?

THE COURT: No. That's the program, I believe at this point. This book in front of me is not up to date.

MR COPPERTINO: Unfortunately, my statute isn't either, but I believe the gist of the statute is that once a defendant has been charged under 1192.2, it's statutory that along with it goes 1192.3 and 1192.1 and I

believe the defendant has been on sufficient notice, being it's the intent of the legislature of the State of New York to have such a charge occur in a case like this.

THE COURT: Yes, you want to be heard again?

MR. LAVALLEE: Yes, Your Honor. With regard to the People's opening statement, in their statement, they specifically mentioned 1192.2, the Breathalyzer reading and I would submit to the Court that the People would then have made a defective opening statement and I also have a motion to dismiss with respect --

THE COURT: You don't understand what's being said here. What's being said here, it's statutory that with respect to it, what he's charged with, that the three also gets charged.

MR. LAVALLEE: Statutory -- You Honor, the People have the power to do it. I do not believe that one goes and one must be charged

with another.

MR. COPPERTINO: If I just may have a minute, Your Honor?

THE COURT: Yes.

MR. LAVALLEE: Judge, If I might --

THE COURT: Wait just a moment, so we can clarify this issue.

MR. COPPERTINO: Your Honor, my 1989 edition, it's 1192 subdivision 7 and the subtitle is conviction of a different charge.

THE COURT: I believe they changed the number now, but it's the same section.

MR. COPPERTINO: I'm sure the Court is right about that, but I don't believe -- although the enumeration is different, I believe it still reads exactly the same way, that is; a driver may be convicted of a violation of subdivision 1, 2 or 3 of this section, notwithstanding that the charged laid before the Court alleged a violation of subdivision 2 or 3 of this section and

regardless of whether or not such conviction is based upon a plea of guilty.

THE COURT: Yes, that's the provision. That's why, generally, in these cases, all three sections are charged, when a defendant is charged with just section 1192.2.

MR. LAVALLEE: However, Your Honor, this is now the end of the case. I mean, if the People had made this motion prior to the beginning of the case, then defendant would have been able to effectuate an adequate defense.

THE COURT: They didn't make any motion, so the record's clear. I think the record is clear. I indicated what I was going to submit. They don't make a motion.

MR. LAVALLEE: You didn't indicate on the record what you are going to charge, prior to trial.

THE COURT: I'm indicating to you now. It's required by law at the close of the

evidence, that I intend to submit all three charges.

MR. LAVALLEE: That's why I'm objecting.

THE COURT: But the People didn't have to make a motion in that regard or request it in that regard. That's what I indicated that I would be charging based upon the statute.

MR. LAVALLEE: Correct, Your Honor.

THE COURT: It's possible for the jury to find the defendant not guilty of two and guilty of three, based upon the common law intoxication, as lawyers usually refer to it.

MR. LAVALLEE: Judge, my problem here is we were charged with a specific violation of the law, to wit, 1192.2, a Breathalyzer reading. We were not charged with 1192.3 and I do have a motion in limine, which I suggest that you allow me to submit to the Court and the Court can make its determination. It's only two pages.

THE COURT: Go ahead, I'll read it.

It has to do with subject matter?

MR. LAVALLEE: Absolutely. Disregard number one, but it's schedule two.

Your Honor --

THE COURT: Wait just a minute. Are you going to add something in favor of the motion?

MR. LAVALLEE: Just going to explain to the Court, had I been aware that the Court was going to charge this, I would have submitted this prior to today. I was assuming, since the People in their opening statement said 1192.2, that that would be the case.

THE COURT: Yes, you want to be heard, Mr. Coppertino?

MR. COPPERTINO: Your Honor, first, with respect to defense counsel's submission of surprise, I submit that this written motion in limine belies that fact. In other words, if he was surprised, how would he have time to draft a motion such as this?

Second, with regard to surprise on the People's opening statement, although we did not mention the exact section, 1192.2, the opening statement clearly went into all the so-called common law indicia of intoxication, so defense counsel could not have been surprised that way either.

Finally, with regard to the case law that the defendant cites, People versus Dumas, it does not -- it is my belief, Your Honor, that this is not a case like this one, which relies upon the statutory provisions of the vehicle and traffic law, permitting a charge to be given by the Judge on all three violations of section 1192, if the facts permit. It deals with a misdemeanor complaint.

THE COURT: Yes, gentlemen. The proper section of 1192.2 -- the reason why you thought it was 1192. and that section provides convictions of a different charge -- a driver may be convicted of a violation of subdivision

1, 2 or 3 of this section, notwithstanding that the charge laid before the Court alleged a violation of subdivision 2 or 3 of this section and regardless of whether of not such conviction is based on a plea of guilty.

The key to this point is the same as any other charge that a judge would submit to a jury. The question is by a reasonable interpretation of the facts could a jury find that this defendant, based on the evidence that's presented, is guilty of three and the answer is yes and the statute provides that it should be charged in that instance. If the People came in here and the only evidence they presented, without adding evidence -- peripheral evidence of breath, eyes, coordination and only presented evidence purely of the test itself, then your arguments certainly would be viable, but they have come in and they have offered evidence of much more than just the test, so it's possible this jury

could determine from the evidence that 1192.3 is an appropriate charge, but disregard the test. And, I've had that happen with juries on occasion, where they found the defendant guilty of three and disregarded the test.

MR. LAVALLEE: With respect to that, Your Honor, as far as being on notice from these indications such as field sobriety tests, slurring of the speech, blood shot eyes, those all went towards probable cause. I was assuming that these were being introduced as probable cause during the Breathalyzer technician's testimony. I did make an objection to the Court that it was outside the -- I forget exactly. My objection was to his testimony as to the field sobriety test and I was objecting to that because we were only being charged with 1192.2 with respect to the surprise and I have no objection at all with allowing the District Attorney's office to have time to respond to this. I did prepare

two separate motions in limine, which I was anticipating that a formal amending of the charges would be given to the Court prior to the opening statement and/or sometime during it and at that time I would have submitted my motion and there was another motion which I was also prepared to submit, but I did not submit because the People came forward with the discovery that I needed.

THE COURT: I think the statute's clear. The People don't need an amended charge to get section 1192.3 before the jury. All they need do is produce evidence that could lead a jury to show, prima facie that the defendant could be guilty of 1192.3. That's what they need. They don't need an amended accusatory instrument whatsoever.

MR. LAVALLEE: It's the defendant's position that the People do have the power and the statute does allow that. However, it is the defendant's position that in order for the

People to do that, the defendant's entitled to written charges or if he wants, he can stipulate having them on the record. The defendant was not given a written amendment of the charges or a stipulation allowing the 1192.3 - not that we need to be allowed, but just to waive the written accusatory instrument. If there was a written accusatory instrument, the defendant would have been able, and be in fact required to be given statutory time limits in which to answer these new charges and being there is no written or formal amendment of the charges until now, at the close of the case, the defendant would submit to this Court that the defendant would be unable now to defend against the charge of 1192.3.

THE COURT: First of all, there is no formal amendment that's being made here. Again, it's a question of statute. The statute is what permits the charge, if there

is evidence in the case to support the charge. The argument which you're making and I gather a due process argument is not viable either, because the defendant has better notice. He's got statutory notice that 1192.3 can be charged to the jury, so your application is denied.

MR. LAVALLEE: Okay, note my objection for the record.

THE COURT: Yes. Now, does anyone else want to be heard on any of the other charges to be submitted?

MR. LAVALLEE: Your Honor, I did prepare a defendant's request to be charging the jury.

THE COURT: I'm not asking for those at this time. I'm still on the submission. Let's finish up with that. Any other objections on the submissions?

MR. COPPERTINO: No, Your Honor, none from the People.

MR. LAVALLEE: What submission?

THE COURT: What charges are being submitted to the jury?

MR. LAVALLEE: No.